Supreme Court, U.S.
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Docket No.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Tenna Phipps Lang, Petitioner,

v.

O. Fayrell Furr, Jr., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

I. Whether the South Carolina system of courts has denied Petitioner equal protection of the laws by preventing her from presenting, or referring to, or any reference to the *Community Standard of Care* expected of an attorney and/or the American Bar Association *Cannons of Professional Responsibility* to the jury for its use as a benchmark by which to gauge the performance of an attorney in a legal malpractice case.

II. Whether the lack of a definitive standard of care, in South Carolina, relating to an attorney's communicating an offer of settlement to a client, has served to deny Petitioner the equal protection of the laws.

II. Whether the lack of a definitive standard of care, in South Carolina, relating to an attorney's communicating an offer of settlement to a client, has served to deny Petitioner the equal protection of the laws.

III. Whether litigant participation in juror selection must be considered a fundamental right

IV. Whether a litigant can be held to an untenable standard in a legal malpractice

V. Whether Petitioner, as a Pro se litigant, has been denied equal protection of the law through the application or misapplication of South Carolina Rules of Civil Procedure and through erroneous action of the Appellate Court of South Carolina.

VI. Whether Petitioner was denied her Constitutional Right to a "fair" trial by Respondent's calling of the trial judge, by surprise, to testify even after he was continually unavailable for deposition by Petitioner under color of being judicially "busy."

VII. Whether a trial judge can charge the jury with charges where no evidence has been presented at trial to support the charge or where the charges are simply not available. Whether the Appellate Court can refuse to address these issues when raised and argued on Appeal.

VIII. Whether the Petitioner was denied her Constitutional Right when the trial judge charged the jury that they could not be concerned about what they may think the law should be but, for this case, only with what he charged the law to be.

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Tenna Phipps Lang, appearing Pro se, petitions for a Writ of Certiorari to review the judgments of the South Carolina State Court of Appeals. The Petition for Writ of Certiorari to the Supreme Court of South Carolina was denied.

OPINIONS BELOW

Tenna Phipps Lang v). Fayrell Furr, Jr. SC Court of Appeals Unpublished Opinion No. 95-UP-218.

Tenna Phipps Lang v Lady International Fitness Center SC Court of Appeals Unpublished Opinion 89-MO-080.

JURISDICTION

The South Carolina Court of Appeals affirmed the judgment of the Circuit Court July 18, 1995.

Petition for rehearing was denied, August 23, 1995.

Petition for Writ of Certiorari to the Supreme Court of South Carolina was denied February 22, 1996.

Extension to file Petition for Writ of Certiorari to the Supreme Court of the United States was granted May 22, 1996.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a)

CONSTITUTIONAL PROVISIONS AND STATUES

United States Constitution:

Fourteenth Amendment (1): "....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 19, 1991 Tenna Phipps Lang, Petitioner, sued

attorney O. Fayrell Furr, Jr., for Breach of Contract and Legal Malpractice arising out of his representation of her in a personal injury action for negligence and gross negligence against Lady International Fitness Center "Health Spa" and Hoggan Health Industries (manufacturer of the exercise machine). The jury returned a verdict for Furr. Lang appealed issues of the trial court rulings.

While Lang was exercising at Lady International Health Spa in Myrtle Beach, South Carolina, on July 16, 1984, she was seriously and permanently injured when an exercise machine malfunctioned. The machine that injured Lang was a lateral pull-down machine, nine feet in height, with a twelve pound, solid steel "dorsey bar" attached to a cable at the top of the machine with an "eyebolt", with weights attached to the cable.

During discovery, it was revealed that Lady International had modified the exercise machine by replacing the "eyebolt" with an open "S" hook and by substituting an in-house cable of shorter length which made the exercise machine dangerous and unsafe.

In ordinary use by Lang, the "S" hook became disengaged from the cable thus releasing the twelve-pound, solid-steel dorsey bar-- which came flying through the air crashing on top of Lang's head -- rendering her unconscious and causing serious and permanent injuries.

It was undisputed fact at the trial of Lang v Lady International that the "Spa" had assembled this particular piece of exercise equipment in contravention of the manufacturer's written directions by failing to use the "eyebolt" and cable, as designed and specified by the manufacturer; but instead, substituted an open "S" hook for the required "eyebolt" and also substituted an in-house cable of shorter length, not otherwise approved of or supplied by the manufacturer, which made the exercise machine dangerous and unsafe. This was a deliberate disregard of the manufacturer's

assembly instructions. The "Spa" knowingly permitted its clientele to exercise on this dangerous and defective exercise machine.

Furr settled Lang's claim against Hoggan Industries for $25,000.00 and proceeded with her action against Lady International in the amount of $5,000,000.00. Lang later learned, during the appeal of Lang v Furr, that Lang's actual total damages, calculated by economist Oliver Wood for Furr, was $7,158,306.00.

The present case, Lang v Furr, came to trial in the Court of Common Pleas for Horry County, SC May 17, 1993, and on May 20, 1993, the jury rendered a general verdict for the Respondent. An order of judgment by David McInnis, the trial judge, was entered in favor of the Respondent on July 7, 1993.

The actions of trial Judge McInnis and his charges to the jury virtually insured the protection of the Respondent. As an example, Judge McInnis erroneously granted the Respondent four directed verdict motions on disputed issues of fact. Issues which, by law, should have gone to the jury. In addition, the court arranged for Judge McGowan, the trial judge in the underlying case, to come and testify for attorney Furr. Over objection, Judge McInnis allowed Respondent to qualify Petitioner's witness Mr. McCutcheon, (attorney for the Health Spa in the underlying case), on cross examination, to testify both as a character witness and expert witness for Mr. Furr, without any prior notice to Petitioner, in addition to Mr. Brittian who was listed as Furr's expert witness.

Petitioner's counsel, Hans Paul & Associates, resigned from the case after the trial of Lang v Furr (having received a directive phone call from attorney Mr. Brittian) because they were overwhelmed by the "influence" at the trial Lang v Furr, thus forcing Petitioner to appear pro se in her appeal without any schooling in law or related experience, plus while suffering with chronic pain from the permanent disability caused by the accident at the hands of Lady International Fitness Center.

Subsequently, Mr. Paul committed suicide by a gun shot to the head.

Petitioner is entitled to equal protection and application of the law and to due process which, were denied her at trial and on appeal. Evidence by the Record.

The Court of Appeals affirmed the judgment of the circuit court in Tenna Phipps Lang v O. Fayrell Furr, Jr., Op. No. 95-UP-218 (S.C. Ct. App. filed July 18, 1995).

The Petition for rehearing was denied, August 23, 1995.

The Petition for Writ of Certiorari to the South Carolina Supreme Court was denied February 22, 1996.

Petitioner seeks a Writ of Certiorari to review that decision.

Extension to file Petition for Writ of Certiorari to the Supreme Court of the United States was granted May 22, 1996.

REASONS FOR GRANTING THE PETITION

The Court Opinions cited are erroneous. The "standard" has been grossly misapplied. There is a legal controversy and a direct conflict with the rulings of the legal issues of the SC Court of Appeals, other State Courts, Federal courts, and this Court. There is a direct conflict between the decision of the court of appeals ruling in the underlying case Lang v Lady International and that of the highest court of this state and that conflict concerns federal questions which the lower court used to block critical issues in the malpractice case Lang v Furr.

Judge McInnis, the trial judge in Lang v Furr, granted Respondent four directed verdict motions on highly disputed issues which, by law, should have gone to the jury. This case is illustrative of persistent and serious misapplication of the law. The impact of the decision below on the public is enormous.

I. The South Carolina system of courts deprived and denied Petitioner equal protection of the laws by preventing her from presenting, or referrring to, or any reference to the *Community Standard of Care* expected of an attorney and/or the American Bar Association *Cannons of Professional Responsibility* to the jury for its use as a benchmark by which to gauge the performance of an attorney in a breach of contract and legal malpractice case.

In Lang v Furr, the trial court granted Respondent's directed verdict motion in limine, disallowing any reference by Petitioner's expert legal witness, Grover Seaton, to specific ethical rules or standards of care, ABA cannons, or other guidelines. In the ruling by the Court, Seaton could only testify as to the "general" standard of care.

The trial judge instructed and charged the jurors:

> "To determine whether a particular act is negligent, you should compare that act with the manner in which a person of ordinary reason and prudence would have acted in similar circumstances. But we're not talking about just a person in this case, we're talking about the negligence of an attorney. So you must find that this attorney in this case, this defendant, breached the standard of care generally recognized and accepted by average competent attorneys in the community and not necessarily the reasonable man in the community."

Jurors on a legal malpractice case are hardly expected to be knowledgeable reviewers of legal performance. Therefore, they need specific standards and benchmarks of performance by which to gauge the suitability of a lawyer's performance.

In Berman v Rubin, 138 GA. App. 849, 227 S.E. 2d 802, 806 (1976) and Cianbro Corp. v Jeffcoat

and Martin 804 F. Supp 791 (D.S.C. 1992) the courts said the following:

> "Expert testimony is required in most legal malpractice cases because 'the jury cannot rationally apply a general statement of the standard of care unless it is aware of what the competent lawyer would have done under similar circumstances.'
>
> "This general standard of care is not, however, particularly helpful in assessing specific instances of alleged malpractice. Therefore, as in other professional malpractice actions, the plaintiff in a legal malpractice action ordinarily must establish by expert testimony the specific duty of care required of the attorney and the breach thereof." Cianbro Corp . v Jeffcoat and Martin 804 F. Supp 791(D.S.C. 1992)

Also in Kemmerlin v Wingate, Wilson, Wingate and Peterson, -- No. 21097, the Supreme Court of South Carolina said:

> (6) In determing whether accountants have used requisite reasonable care and competence, expert testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom.
> (7) Negligence: Juries must be informed of criteria upon which a defendant's conduct, charged as negligence, is to be judged.

Petitioner argued that, in the absence of evidence of the American Bar Association *Cannons* or other guidelines, the jury would have had no basis for understanding what kind of skill or behavior could reasonably be expected of a practicing attorney. By

depriving Lang of the opportunity to provide an accepted measure of expected performance, the trial judge deprived the jury of any benchmark of performance.

If the ABA *Cannons* or other guidelines cannot be used as a guide for a lay person serving as a juror, then it follows that, essentially, there could never be legal malpractice in the State of South Carolina, because, effectively there is no real standard of performance. Truly, any attorney could exercise whatever ever standard of care behooved him on any particular case, and then could later merely bring in a friend as his Lawyer and to testify as his legal witness that what the accused attorney has done is exactly the way he (the "expert" witness) does it in his office and there you have a different standard in every case.

The South Carolina Court of Appeals upheld the trial Judge's error in granting Respondent's motion in limine to exclude denying Petitioner the right to have her expert witness, Mr. Seaton, explain to the jury the specific duty of care required of the Respondent in this case and the breach thereof. In a legal malpractice case, presentation of an "official" standard of care must be considered a fundamental right.

Proof of malpractice requires two evidentiary steps:

> "Evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of Plaintiff. Davis v Virginian R. Co., 361 U.S. 354, 4 L ed 2d 366, 80 SCT 387.

Petitioner's issue involves a novel question of law which arises with the emergence of ardent consumerism related to the competence of lawyers. Just as the South Carolina Supreme Court is currently first addressing the issue of public acknowledgment of

complaints against members of the bar in South Carolina, the Court should and must provide a definitive statement of by what standards the conduct of the state's lawyers can or should be gauged.

Since jurors on a legal malpractice case are not knowledgeable reviewers of legal performance, they need various standards and benchmarks of performance by which to gauge the suitability of the lawyer's performance. Petitioner's jurors were denied this benchmark by which to measure Respondent's performance and, as a result, the Petitioner was denied her opportunity for a jury of her peers to pass knowledgeable judgment on whether she was wronged by her attorney. For this reason the Petitioner has been denied her Civil Rights and equal application and protection of the laws.

The Court of Appeals Opinion No. 95-UP-218 stated:

> "Ostensibly, Lang wanted to establish Furr's violation of canons and ethical rules amounted to violation of a statute, or negligence per se. '... The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or extradisciplinary consequences of violating such a duty.
>
> Therefore, we find no error in the trial court precluding Seaton from testifying about specific Rules of Professional Conduct or Canons of Ethics which Seaton felt Furr violated."

It's not what Seaton "felt" Furr violated; it's what the rules and standards either are or are not. It's then for the jury to decide whether Furr violated those definitive rules.
The Opinion also stated:

> "Further, in response to Furr's motion to exclude references to ethical rules or canons, the trial court ruled Seaton could testify as to proper standard of care and that's it. Seaton was qualified as an expert and testified extensively concerning the ways he believed Furr breached the standard of care. 'Assuming the court did in fact commit error in excluding the testimony, Lang has not demonstrated prejudice from the ruling.' "

The appellate Court Opinion made erroneous statements. The critical point here is the trial judge instructed and charged the jury: " ... You may consider the expert's opinion just as you do all other evidence in the case and it is for you, the jury, to give it such weight as you in your experience and discretion may determine. I mean you must weigh such evidence and accept or reject it or believe it or disbelieve it in the same manner as you treat all other evidence in the case, whether by an expert or a lay witness. (R p 545 lines 5-11)."

However, The Rules of Professional Conduct or Canons of Ethics that Furr violated are definite rules adopted as such by the South Carolina Supreme Court in 1956 and the jury would have been compelled to accept the rules as they apply and would not have been allowed to believe or disbelieve all, any, or none of the rules which existed pursuant to the South Carolina Supreme court's adoption of them. The Rules were simply the Rules. There is certainly a world of difference between the two -- an opinion and a rule. Therefore, the ruling by the lower court and the Appellate Court was seriously prejudicial to the Petitioner, depriving her of equal application of the law and due process.

Respondent argued that the Cannons of Professional Ethics, were strictly to be used for disciplinary action by the Bar. His

position was affirmed by the Court of Appeals, as stated in its opinion above.

However, The Supreme Court of South Carolina in Opinion No. 18345 May 12, 1965 said:

> [7,8] The Canons of Professional Ethics, as promulgated by the American Bar Association, were adopted as a Rule of this Court in l956, and such Canons represent the consensus of the bar on the standard that lawyers in their practice should follow and uphold. These Canons prohibit an attorney from engaging in practices that bring the courts or the legal profession into disrepute. When an attorney fails to render proper service he invites and merits disciplinary action. Norris v Alexander, 142 S.E. 2d 214.

But, according to the South Carolina Court of Appeals and rulings in this present case there is no standard of care in a case against an attorney for Breach of Contract and Legal Malpractice case in South Carolina. My cry for relief is on behalf of myself and all of the citizens in South Carolina who are suffering from the vestiges of a corrupt "good ol' boy," double-standard, self-serving legal system, which gives lawyers unlimited/absolute immunity from liability for Breach of Contract and Legal Malpractice, depriving myself and all citizens of their Civil Rights, due process of the law, equal application of the law, and equal protection of the law as provided in The Constitution of the United States.

Given the fact that the original complaint in Lang v Furr charges two causes of action, i.e., Legal Malpractice and Breach of Contract, the Petitioner did not need to prove that the result in the underlying case would have been different except for the acts or errors and/or omissions charged to the Respondent. The cause of action for Breach of Contract results from the Respondent's failure to exercise that Standard of Care required of him as prescribed by the CANNONS OF PROFESSIONAL CONDUCT.

II. The lack of a definitive Standard of Care, in South Carolina, relating to communicating an offer of settlement to a client, served to deny Petitioner THE EQUAL PROTECTION OF LAWS.

Respondent failed to convey, to his client, reasonable offers of settlement ranging from $550,000 and $750,000 to $900,000 advanced by Lady International Fitness Center. Such offers were within the range of reasonable settlement and would have been accepted by the Petitioner. To further affirm that she did not have any idea of the purported settlement offer, Petitioner testified (R.198, Lines 14-15) "If the Five Hundred and Fifty Thousand Dollars ($550,000.00) had been offered to me, I would have accepted it."

Respondent was not able to produce any field or office notes, or a diary or log of any type backing up his contention that he did, in fact, convey offers of settlement to the Petitioner.

> Respondent testified "... the $750,000.00 Seven Hundred Fifty Thousand Dollar offer in this case I think is great; but if we get a verdict, we could get a big one. And that is what I told her."
> Question: You didn't make any notes or document that?
> Answer: No.
> Question: Did you present that offer to her in writing?
> Answer: No.
> (R.p. 635 lines 10-16)

Respondent improperly assumed unto himself the right to decide the merits of settlement offers advanced by the Defendant Lady International and the Respondent independently declined such offers without the Petitioner's knowledge. The Petitioner wanted to settle the case and made such desires known to the Respondent well before the trial took place. Petitioner simply could not afford to chance losing the case and <u>any</u> settlement would be better than nothing. The Monies could be invested to provide some type of income for Petitioner's survival.

Petitioner's expert legal witness, Grover Seaton, testified that "... because of the nature of the injury and the amount of the offer that was made, that the matter should have been substantially confirmed communication by letter to Ms. Lang. I would think that the size of this offer would mandate it had she refused it ... the size of that offer, I would have asked the trial judge -- and I know that Judge McGowan would have allowed it -- for at least several hours, if not the entire day, to discuss that with the client, to go over other aspects of how you could improve that settlement, such as an annuity. (R.341 line 19-25, R. 342-343 thru line 17, R. 357 lines 14-25).

Seaton stated further that "... in a letter exchange, using a figure of $600,000.00 and general contingency is a third, the attorney has a $200,000.00 return that he should consider, secondarily to what his client's instructions are. It may greatly alter the contract between he and his client, i.e. you may want a second opinion as to whether or not this is an adequate offer; you may want to talk to an actuarialist pertaining to tax advantages; it may include the possibility of having another attorney take over the case containing an agreement as to what you as an attorney are owed because you are not of the opinion of the client. Seaton further states "there is all types of ways that it would reform the contract between you and your client. A reasonable attorney using the Standard of Care would give the client all information necessary to permit that client to make an informed and intelligent decision." (R. 344 lines 6-8. R. 345 lines 3-6).

Respondent has previously stated on direct examination (R.440 lines 1-5) that " I thought the offer at that time was five hundred; it now appears it was five-fifty, based upon what Mr. McCutcheon says. And I don't remember exactly but it was five or five hundred and fifty thousand dollars." (emphasis added) Obviously, Respondent didn't even know what the actual amount of the settlement offer was that he "thought" he conveyed to Petitioner.

The Respondent, **and only the Respondent**, knew that attorney McCutcheon, attorney for Defendant Lady International Fitness Center, before the trial, had evaluated the prospects of the case as 95% for the Plaintiff and 5% for the Defendant. Buoyed by this confidence, the Respondent chose to "roll the dice" for the glory of a win, disregarding his responsibility to his client.

Respondent is a very wealthy man and married to a very wealthy woman and his need for an ego-booster with a big win was more valuable to him than a few hundred thousand dollars as confirmed by his testimony above regarding the $750,000.00 offer; that's what he was thinking about -- the big win placing him on TV and in the newspaper. The news reporter from Channel 13, WBTW TV Florence, SC, was present every day covering the trial. An update on the trial was given on the television eleven o'clock news every night that the case was continuing and could be in the "millions of dollars." It's obvious Respondent was caught up in himself, evidenced by his intentionally and repeatedly excluding Petitioner from participating in all phases of the underlying suit of Lang v Lady International. Since Respondent did not allow Petitioner to sit in the courtroom during the trial she had no way of knowing what was being said or taking place in the courtroom.

Respondent's prosperity was a far cry from the position of the Petitioner who, as a result of the accident in July, 1984, at Lady International Fitness Center, rendered her permanently disabled, closed her business reducing her annual income from $100,000.00 a year plus other benefits to only social security disability -- a single woman with three children no child support and with barely enough to exist, unable to afford medical insurance, suffering with chronic pain and lost quality of life.

At no place in the trial or in the transcript is there any evidence or testimony that anyone heard any offer of settlement conveyed to Petitioner because **there was never an offer transmitted to her. In fact, no one, at any time in the trial, said that he or she ever heard Respondent even so much as mention**

a settlement offer to Petitioner. The truth is -- no one heard any offer of settlement conveyed to Petitioner because **there was never an offer transmitted to her.** (R.441 lines 17-21).

Since the jury was deprived of any benchmark of performance to judge the attorney's actions, they were so confused and, after the testimony of Mr. Brittian and Mr. McCutcheon, legal expert for Furr, indicating how so often their clients "leave the decisions up to them," and with the jury not knowing what the standard of care is, the jury was prevented from rendering anything but a general verdict for the Respondent.

Respondent's failure to convey such offers of settlement was such an obvious breach of any reasonable Standard of Care, relevant to a competent attorney, that he obviously failed to adequately perform on his contract with Petitioner and that his legal malpractice was prima facie. The Courts which supported Respondent to the detriment of Petitioner thus violated her Civil Rights, right to Due Process of the Law, and equal application and protection of the laws.

III. A litigant's participation in juror selection must be considered a fundamental, personal, constitutional right.

The trial judge granted Respondent a directed verdict motion on the issue of Plaintiff not being allowed by Respondent to participate in the jury selection, thus removing this highly disputed issue of fact from the jury. This ruling is in direct conflict with the following Federal Court Rulings:

> The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions.

> Tiller v Atlantic Coast Line R. Co. {318 US 54}, Bailey v Central Vermont R. Co. 319 US 350-354-(1943).
>
> We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed question of fact, why it should not decide such question as these as well as others. The right to trial by jury is "a basic and fundamental feature of our system of Federal Jurisprudence". Jacob v New York City 315 US 752.

Petitioner cannot imagine what type of evidence a plaintiff in a legal malpractice action could produce to prove that, had she been allowed to participate in the jury selection, she would have won her case. Should she have interrogated all the persons in the voir dire who were not selected to serve?

Nor do the defendant attorneys here suggest what that evidence would be. If proving "but for" were really the standard, it would effectively give lawyers unlimited immunity from liability for breach of contract and legal malpractice.

But, in any case, the question was one of fact for the jury. And, several courts have said: "... proximate cause is normally a question of fact for the jury." Rouse v Dunkley & Bennett, Supreme Court of Minnesota No. C6-93-777.

> " Issues that depend on the credibility of witnesses, and the effect or weight or evidence are to be decided by the jury. Gunning v Cooley 281 US 90.

Even in the face of these and other cases, however, the trial judge erroneously removed this issue from consideration by the jury. (The Court of Appeals Opinion is erroneous. Petitioner has argued this issue from the beginning of the appeal.)

IV. Petitioner cannot be held to an untenable standard in her legal malpractice action against O. Fayrell Furr, Jr.

As the Court of Appeals Opinion # 95-UP-218 (S.C. Ct. App. Filed July 18, 1995) Pg. 3a Id at 1-2 stated:

> "The third issue on appeal involves Furr's negligence in intentionally and repeatedly excluding Lang from participating in all phases of the suit, particularly jury selection, resulting in the seating of an antagonistic juror."

The trial judge ignored the law and rules of civil procedure and granted the Respondent a directed verdict motion on this disputed issue, removing it from the jury. The court of Appeals affirmed.

Petitioner's expert legal witness, Mr. Seaton, testified that the ultimate decision of seating a juror was the decision of the client, that it was fundamental, and that decision was basic to the entire process, and that once that process was polluted, then everything that followed was also polluted. Seaton stated Furr breached the standard of care by not allowing Lang's participation in the jury selection process.

The jury issue was a highly disputed issue of fact at the trial of Lang v Furr. There was, of course, a factual dispute as to whether Petitioner was present during jury selection. Petitioner and her son testified that Furr intentionally directed them to the County Administration Building, under the guise of an asbestos removal taking place in the main courtroom. Furr testified that Lang was present during jury selection, that he believed he should exercise a peremptory strike on Mr. Spivey, and that it was actually Lang and her family who wanted to retain Mr. Spivey as a Juror. (R. 183 line 1-R. 189 line 10).

> "...In order for a directed verdict to be proper, it not only must be clear that no issue of fact is involved, but the conclusions and inferences to be drawn from

the facts must be undisputed as well..."Garrett et al. v Snedigar et al 359 SE 2d 283 (SC CA 1987).

"In determing whether there are material issues of fact on a motion for summary judgment, all inferences from facts must be viewed in light most favorable to the party opposing the motion; accordingly, summary judgment is inappropriate if facts are conflicting..." Alston v Blue Ridge Trading Co., 108 S.C. 292, (S.C. App. 1992)

Court of Appeals Opinion No. 95-UP-218 pg.10a States:

"To presume Spivey's presence on the jury in the earlier case resulted in a unanimous jury verdict in favor of Lady International would be to engage in complete speculation, in view of Seaton's testimony. The jury in this case might draw that inference, but it would have no basis in the evidence. Accordingly we affirm the trial court's dismissal of this allegation of malpractice from the case."

If the jury could have drawn that inference, the issue could have been resolved in Petitioner's favor and, thus, the issue was inappropriate for summary judgment. Once again, Petitioner was deprived of her right to equal protection of the laws.

During Voir Dire questioning, a prospective juror, one Larkin Spivey, intentionally concealed that he was a neighbor who was antagonistic to the Petitioner and her children, yet he served as foreman of the jury. Respondent relied on Carlson v Fredrikson & Bryon, 475 N.W. 2d 882, (Minn. App. 1991). "To prove proximate cause in a legal malpractice case, a plaintiff must show that but for the attorney's alleged negligence, she most probably would have won at trial." Carlson v Fredrikson & Byron, P.A., 475 N.W, 2d 882,886 (Minn. App. 1991). This case was overturned

August 26, 1994 by Rouse v Dunkley & Bennett, Supreme Court of Minnesota No. C6-93-777 saying:

> "We disagree with the standard set out in Carlson, We cannot imagine what type of evidence a plaintiff in a legal malpractice action could produce at summary judgment to show that a factfinder in the underlying matter necessarily would have resolved factual disputes and credibility issues in his or her favor, nor do the defendant attorneys here suggest what that evidence would be.
>
> "The Carlson opinion was wrongly decided to the extent that it suggested that plaintiffs must show at summary judgment that it is more likely than not that the issue of causation would be decided in their favor and we reject the standard.
>
> " 'For negligence to be the proximate cause of an injury, it must appear that it the act is one which the party ought, in the exercise of ordinary care to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.' Rouse v Dunkley & Bennett, P.A., Supreme Court of Minnesota No. C6-93-777 August 26, 1994. This test is consistent with our prior legal malpractice cases, but we reverse because we conclude that the court of appeals incorrectly applied the test. We also stated that proximate cause is normally a question of fact for the jury. "

Mr. Seaton, expert witness for Petitioner in Lang v Furr, testified on the directed verdict motion regarding the disputed juror Spivey that it would be speculation to opine that the result would have been different. Mr. Brittian, expert witness of the Respondent, likewise testified to the effect that it would be speculation to opine that Mr. Spivey's presence on the jury changed the trial's outcome. (R.366 line 18-25, R. pp. 367-369 thru line 19)

Testimony from the trial transcript Lang v Furr:

By Mr. Baker:

Though there's one percent chance that the defense is going to win, if they win it's just utter speculation to say that had Mr. Spivey not been on the jury -- (R.368 Vol. II lines 12-14)

By the Court:

Well I agree with your analysis but it's a little different from a medical malpractice case when a doctor says, you know, "this doctor that performed the operation allowed this vein to be severed and he bled to death and if it hadn't been for that scientifically, the patient would have lived." (R.368 Vol II Lines 15-10)

By the Court:

When you are trying to read the minds of twelve jurors, how does any lawyer get up and say, "But for this, the case would have ended differently."?

By Mr. Baker:

Judge, that's exactly my point. It would be utter speculation. If Mr. Seaton had made that statement if he had testified like that, I would have been making the same motion on the grounds that as a matter of law, it is just pure and utter speculation. The law in South Carolina states proximate cause has to rise above surmise, conjecture and speculation. No lawyer could say that, I agree with you. That means there's no proximate cause. (R. 368 Vol II lines 24-25, R. 369 lines1-7.)

By the Court:

Well that means there's no legal malpractice either, in South Carolina.

By Mr. Baker:

No, sir, it -- well, on this kind of issue, on a tactical decision --

By the Court:

How could any lawyer in any legal malpractice case say the jury would have reached a different conclusion to a

reasonable degree of legal certainty? How could he ever say that in any case? (R. 369 Vol. II lines 12-15).
By the Court:

Well I think the testimony of Mr. McCutcheon that it was a ninety-five percent (95) percent (5%) position for the plaintiff as he evaluated the case, would give rise to the thought that something went wrong.

"Proof of malpractice requires two evidentiary steps: Evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of Plaintiff." Davis v Virginian R. Co.,361 U.S. 354, 4 L Ed 2d 366, 80 S.Ct.387.

Petitioner's participation in the jury selection process must be considered a fundamental right and when Respondent intentionally directed Petitioner and her son to the County Administration Building, under the guise of an asbestos removal taking place in the main courtroom, Respondent violated the rules of professional practice and breached his contract to provide good and sufficient legal services to the petitioner. Respondent in his brief stated he mistakenly sent Petitioner and her son to the County Administration Building across the street from the main court house. If this were true why didn't he send someone over to get them before he selected the jury?

Respondents motion for directed verdict on the jury issue was made in limine and argued; however, the trial judge waited to grant the motion until the end of the trial, removing the highly disputed issue from the jury.

But,

"When evidence in legal malpractice case is such that reasonable people could differ whether defendant fell short of professional standard, jury must decide." Chocktoot v. Smith, Or., 571 P. 2d 1255.

The Petitioner was wrongly denied her right to a fair jury selection and to a fair subsequent trial. By law, the trial judge cannot grant a directed verdict on a disputed issue of fact. The Petitioner was thus denied her Constitutional right to equal protection of the laws.

V. Petitioner, as a Pro Se litigant, has been denied equal protection of the law through the application or misapplication of South Carolina Rules of Civil Procedure and through erroneous action of the Appellate Court of South Carolina.

There is a clear conflict of law between the Court of Appeals of South Carolina, The Supreme Court of South Carolina, this Court, other State Courts, and the Constitution of the United States.

The Supreme Court of South Carolina granted a motion to dismiss certain "exceptions on appeal" made by Mr. McCutcheon, Attorney for Lady International Health & Fitness Center ("Spa"), based on Rule 50 of the South Carolina Rules of Civil Procedure, on account of the failure by Furr to move for a directed verdict during the trial of Lang v Lady International. Mr. McCutcheon argued that Furr's failure prevented Furr from arguing, on Appeal, the critical issues of sufficiency of the evidence, negligence, and gross negligence which were the heart of Petitioner's case.

Once the Supreme Court granted Mr. McCutcheon's motion to dismiss the exceptions he noted, that ruling, i.e. that Furr had "failed to move for a directed verdict ...." became the law in the case.

Later, ignoring the Supreme Court ruling on McCutcheon's exceptions and disregarding the law as well as the State and Federal Rules of Civil Procedure, the South Carolina Court of Appeals issued its Opinion No. 89-MO-080. Lang v Lady International which directly ruled on the sufficiency of the evidence.

As its Opinion No. 89-MO-080 Lang v Lady International pg. 12a states:

> "The sole issue .... While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record...."

Subsequently, the Supreme Court of South Carolina denied Petitioner's Writ of Certiorari to review the Appellate court decision even though the South Carolina Court of Appeals Opinion No. 89-MO-080 Lang v Lady International is in direct conflict with the South Carolina Supreme Court's own ruling granting McCutcheon's Motion to Dismiss on this issue.

> "Objection to sufficiency of evidence cannot be raised for first time in motion for new trial; motion for directed verdict is prerequisite to motion for new trial on ground that evidence does not support verdict." Peavy v Ross (1987), App) 292 SC 535, 357 SE2d 482.
> Appellate Practice & Procedure {8.1} "Neither the court of appeals nor the parties can confer appellate jurisdiction, absent statutory authority."

The South Carolina Court of Appeals ruling is also in direct conflict with rulings of this Court.

> " Speaking of the necessity of the interposing a motion for a directed motion where the sufficiency of the evidence is to be challenged, we said in Emanuel v. Kansas City Tile & Trust Co., supra, 'But if the plaintiff intended to appeal in case the verdict went against him and to challenge the sufficiency of the evidence to support a judgment for the defendant, it was essential that he request the trial court to direct the jury to return a verdict in his favor and that he secure from the court a ruling upon his request.' "
>
> "In the absence of such a request and ruling, the question of the sufficiency of the evidence to support the verdict and judgment is not subject to review by this court. '. . . As this is an action at law, we have under

> the Constitution (Amendment VII), U.S.C.A. Const. Amend 7, no jurisdiction to review or reexamine the facts, but can consider only questions of law. In the absence of a motion for judgment in favor of defendant, or other similar proceeding challenging the sufficiency of the evidence, no question of law is presented for our consideration....' " Een v Consolidated Freightways 220 F. 2d 82.

> "The requirement of a proper directed verdict motion as foundation for a motion for judgment notwithstanding the verdict is not a mere technicality but serves vitally important interest in the fair conduct of litigation." Fed. Rules Civ. Proc. Rule 50 (a,b), 28 U.S.C.A.

Later, Furr claimed he consciously decided not to make a Motion for Directed Verdict in order to avoid reminding the Defendant Spa's Attorney, Mr. McCutcheon, of his own need or desire to make a similar motion.

But, since Mr. McCutcheon had already "evaluated" the case of Lang v Lady International before trial, at "95% in favor of the Plaintiff/Lang and 5% in favor of the Defendant/Spa, he had no need for, or intention of, filing an appeal or arguing the sufficiency of the evidence if Plaintiff won her case. Consequently, McCutcheon did not need to make a directed verdict motion since he never expected to win.

The point here is that in the legal malpractice case against Furr, the Trial Judge granted the Respondent a directed verdict motion in limine disallowing Petitioner from presenting his (Furr's) critical issue of failure to take an important action to protect the record, pursuant to Rule 50, South Carolina Rules of Civil Procedure, during the trial of Lang v International. The trial judge stated:

> "Your motion as to preclude any testimony as to the directed verdict is granted. (R.p. 70 line 19-20) 'I think to do otherwise would be me telling the Court of Appeals that they were wrong, which is often times my opinion, but I don't express it.' " (R. p. 70 line 25, p. 71 line 1-2).

The point is -- the Appellate Court was wrong and because of it, Petitioner was deprived of her constitutional right to equal application of the laws. The Appellate Court states in its Opinion **No. 89-MO-080 Pg.12a Par. 3 Lang v Lady International the underlying case:**

> The sole issue ... "While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record..."

The Court is saying that Furr, representing the Appellant, failed to draw an exception challenging the possible finding for Respondent Spa based on its general denial .... Surely this cannot be the Standard of Care expected of an attorney in the State of South Carolina?

The issue is critical to the malpractice case since the actions of the Petitioner's attorney in the case of Lang v Lady International, O. Fayrell Furr, Jr., were not the proper steps to protect the record for an appeal and Petitioner was deprived of the opportunity available throughout the judicial system to argue, on appeal, the errors of law committed by the trial judge during the trial depriving Petitioner of fair conduct of litigation to which she is entitled under equal protection of the law. (The Respondent and Trial Judge effectively managed to fabricate a method through the Appellate Court to protect themselves through the Appellate Court by ignoring the Supreme Court Ruling, thus protecting both of them should any further action be taken.) As evidenced in the

Appellate Court **Opinion No. 95-UP-218 Lang v Furr pg. 5a par.2,**

> "...Hence, even if Furr had made a directed verdict motion the trial court would have erred in granting the motion without allowing the jury to pass upon the contributory negligence defense. Accordingly, as a matter of law, Furr's failure to move for a directed verdict did not harm Lang and cannot serve as the basis for a claim of legal malpractice."

The Court of Appeals opinion is erroneous. The jury returned a general verdict in the case of Lang v Lady International and the court has no way of discovering which theory, facts, or issues the jury relied on reaching the general verdict.

Furr's failure did directly harm Lang by depriving her of the opportunity available throughout the judicial process to argue, on appeal, the errors of law committed by the trial judge during the trial of Lang v Lady International, depriving Lang of fair conduct of litigation to which she is entitled under equal protection of the law.

This Honorable Court has stated:

> The requirement of a proper directed verdict motion as foundation for a motion for judgment notwithstanding the verdict is not a mere technicality but serves vitally important interest in the fair conduct of litigation. Fed. Rules Civ. Proc. Rule 50 (a,b), 28 U.S.C.A.

Petitioner's expert witness Mr. Seaton testimony, Record on Appeal Vol. II, page 363 lines 10-15 states:

> Question Mr. Seaton: "In your opinion, would any of those motions have been successful if made by Mr. Furr?
> "I could not tell you that, That's not the issue.
> The issue is to protect the rights of your client in trial proceedings in case you need a post-verdict motion or argument for new trial or appeal."

Another State case ruled:

[4,5] " On the issue of professional negligence the predictability of adverse consequences in important evidence, but it is not the only evidence and whether a reasonably competent lawyer would have foreseen and recognized the risk is also relevant. "Cocktoot v Smith, Or., 571 P. 2d 1255 Attorney and Client. "In an action against an attorney for malpractice, it it the duty of the court to instruct the jury as to the degree of negligence or want of skill for which the attorney is properly answerable, and what duty is imposed on him by law; the jury then determines, (emphasis added) on all the facts and circumstances of the case, whether the defendant has performed his duty..." (Attorneys At Law," 7AM Jur2d) and

Cochrane v Little, (7 Md 323, 18 A 698), Cochrane mandates that the question of the directed verdict motion was a question for the jury -- at least as to whether the defendant has performed his duty ..."

In Glenn v Haynes, (192 VA 574,66 SE 2d 509,26 ALR 2d 1334) the court said, "Stated more succinctly, the degree of care required of an attorney is a question of fact to be determined by the jury ..."

Petitioner's Civil Rights have been denied. Petitioner is entitled to equal protection and application of the laws and due process provided by the Constitution of the United States.

Truax v Corrigan, 257 U.S. 312, 331, so indicates:

"It (due process of law), of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law, 'All

men are equal before the law'; 'This is a government of laws, and not of men:' 'No man is above the law,' *** are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."

VI. Judge McGowan, presided in Lang v Lady International testified for Respondent in Lang v Furr which is in direct conflict with the Judicial Code for Judges.

Petitioner is entitled to a "fair" trial. Bringing in the trial judge, by surprise, especially since he was continually unavailable for deposition by the Petitioner, is so egregious as to completely violate the bounds of courtroom fairness. Judge testified this was his first time ever in 25 years as a Judge.

VI1. The trial judge charged the jury with (contributory negligence, assumption of the risk, estoppel) where no evidence had been presented at trial to support the charge or where the charge is simply not available. Whether the Appellate Court can refuse to address the issues when raised and argued on Appeal, denying Petitioner equal protection of the law and fair conduct of litigation, related directly to the fact that Petitioner has been denied due process and the equal protection of the laws.

Appellate Judge Carol Connor asked at oral argument if the court was to consider all of the questions on appeal and was instructed "Yes," Mr. Lengel explained the only reason all of the questions were not being argued at oral argument is because it was impossible to argue sixteen issues in fifteen minutes. (Prior to oral argument an extension for more time was filed and denied.)

In its Opinion No. 95-UP-218 Pg. 4a footnote 1, the Appellate Court refused to address the issues discriminating against a litigant, appearing Pro se. The Opinion is erroneous.

In the beginning of the Appeal process, the Respondent made motions to strike which included anything he could squeeze in and the court granted all of his motions at that time and the related material was removed from the record early in the appeal.

VIII. The Trial Judge erred when he charged the jury that they could not be concerned about what they may think the law should be but only with what he charged the law to be.

The trial judge charged the jury that they could not be concerned about what they may think the law should be but only with what he charged the law to be. The trial judge (pg.56, Vol.III, lines 14-19) said, "You must accept the law as I give it to you. If I am wrong, there is another place and time for that error to be corrected, but for this case, (emphasis added) you must apply the law as I give it to you.

See S.C. Const Art V 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.") This does not tell the judge to charge they could not be concerned about what they may think the law should be!!!! it says only to declare the law period.

The trial judge's charge to the jury runs counter to the finding in Georgia v Brailsford, et.al., (1794) in the Supreme Court of the United States. Chief Justice John Jay said, "... on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."

The trial judge erred in his instruction to the jury and in so doing violated the constitutional right of the Petitioner to a jury trial, wherein the jury had the right to judge both the law as well as the fact in controversy. (R. 685-686, R. 689). The jury clearly had the authority to decide the case on whatever ground they chose particularly on the issue of contributory negligence, an erroneous charge by the trial judge.

The power of a jury to make any finding it chooses is absolute and finds its origins in the basic documents and foundation theories of the United States system of government. The power of the government comes only from the consent of the governed and the citizenry of the United States must and has reserved unto itself the power to judge the fairness of the law itself -- in addition to the facts of a case which involves any particular law.

Nowhere is this principle of jury power more appropriate than in cases involving the doctrine of *contributory negligence.* For years, the common citizenry has held the belief that the idea that even the merest contribution to the fault of an incident should bar the recovery of an aggrieved person from a defendant who might have been egregiously at fault is obnoxious, unfair, and at odds with appropriate social or public policy.

Unfortunately, even though the doctrine of contributory negligence was never a good idea, it was the law under which South Carolinians suffered until 1991. The people, however, knew "contributory negligence" was a bad idea and the people had the power, through jury verdicts, to strike down the concept of contributory negligence.

The fact that the law has changed -- with an effective date July 1, 1991, so close and prior to the trial of this case Lang v Furr, May 1993, clearly indicates that the popular view of that law was hostile.

The constitutions of both Maryland and Georgia specifically provide for juries to have the power to decide the law and the facts. In addition, American courts have never denied the jury's power to decide as it best see fit.

The trial judge should have charged the jury in accordance with the dictates of the Supreme Court of the United States which under the several Amendments to the Constitution, has guaranteed identical and precedential federal rights to the citizens of the several states. It is a fundamental right of the Petitioner to be given the protection of the Federal Constitution and of all of the relevant Supreme Court rulings concerning the rights of litigants.

CONCLUSION

South Carolina has perpetuated a self-serving, double standard which protects lawyers and which denies citizens the equal protection of the laws because the self-serving standard effectively provides attorneys with virtually unlimited immunity from breach of contract and from law suits for legal malpractice. Thus, denying Citizens of their "inviolate rights."

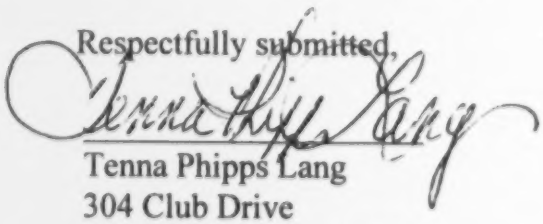
A recent short letter to the local county news paper regarding attorney malfeasance netted over three hundred letters and telephone calls in three days. This is an indication and confirmation of the legal abuse by the lawyers and the judicial system taking place here in South Carolina. The impact of the decision below on the public is enormous.

This Petition may be considered akin to a class action suit and warrants the exercise of this court's discretionary powers, adequate relief cannot be obtained in any other form or from any other court within South Carolina.

This case presents a rare opportunity for this Court to address this miscarriage of justice and to bring much-needed certainty and uniformity to this area to protect all citizens "inviolate rights."

Therefore, Petitioner begs the Honorable Court to grant this Petition.

Respectfully submitted,



June 20, 1996

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APPENDIX A

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tenna Phipps Lang, ...Appellant,

v.

O.Fayrell Furr, Jr., ...Respondent.

Appeal From Horry County
David F. McInnis, Circuit Court Judge

Unpublished Opinion No. 95-UP-218
Heard May 4, 1995 - Filed July 18, 1995

AFFIRMED

James H. Lengel, of Columbia, for appellant.

Charles J. Baker, III, and Stanley C. Rodgers, both of Holmes & Thompson, of Chrleston for respondent.

PER CURIAM: Tenna Phipps Lang sued attorney O. Fayrell Furr,Jr., for breach of contract and legal malpractice arising

out of his representation of her in a personal injury action. A jury found for Furr. Lang appels a number of the trial court's rulings. We affirm.

In July 1984, while Lang was exercising at Lady International health spa in Myrtle Beach, South Carolina, she was seriously injured when an exercise machine malfunctioned. Lang retained Furr to represent her in an action against Lady International and the manufacturer of the equipment, Hoggan Health Industries, Inc.

The machine that injured Lang was a lateral pull-down machiner with a handlebar attached to a cable which holds weights with an "eyebolt." Discovery revealed that Lady International had modified the machine by replacing the "eyebolt" with an "S" hook. The hook disengaged, causing the handlebar to crash down on Lang's head, severely injuring her.

Lang settled her claim against Hoggan Industries for $25,000 and proceeded with her action against Lady International. Lady International defended primarily on the basis Lang was contributorily negligent in suddenly releasing ther handlebar, causing the weights to drop and strike against each other.

The case lasted three days. At the close of the evidence, Furr decided not to move for a directed verdict. Furr believed Lang was winning the case and did not want to remind opposing counsel to make a directed verdict motion. Counsel for Lady International did not in fact make such a motion.

The jury returned a general verdict for Lady International. Furr moved for a new trial and for a judgment notwithstanding the verdicrt. The trial court denied both motions, finding "the verdict returned by the jury was one of the possible verdicts that the jury could arrive at in its overview and determination of the facts in dispute."

Furr appealed on behalf of Lang and we affirmed. Lang v. Lady Int.l Op. No. 89-MO-080 (S.C. St. App. filed May 31, 1989); cert. denied, (Sept. 14, 1989. We stated in our opinion:

> The sole issue on appeal is whether there is any evidence in the record which would support a finding of contributory negligence. While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record to support a a finding of contributory negligence and therefore affirm.

Id. at 1-2

Lang then brought this action against Furr for breach of contract and legal malpractice. She claimed Furr was negligent in; (1) failing to move for a directed verdict at the close of the evidence; (2) failing to communicate an offer from Lady International to settle the case for $550,000 to $900,000; and (3) intentionally and repeatedly excluding Lang from participating in all phases of the suit, particularly jury selection, resulting in the seating of an antagonistic juror.

Prior to trial in this case, Furr moved an order excluding evidence of his failure to move for a directed verdict in the prior lawsuit and excluding reference by Lang's expert witness to ethical rules. The trial court granted these motions. At the close of all of the evidence, the trial court granted Furr's motion for directed verdict on Lang's claim Furr failed to allow her to participate in jury selection. The trial court sent the remaining malpractice issues to the jury. They returned a general verdict for Furr.

Lang moved for judgment notwithstanding the verdict and a new trial, which the trial court denied. This appeal followed.1

I.

Lang first argues the trial court erred in granting Furr's motion in *limine* to exclude evidence of Furr's failure to move for a directed verdict in the Lady International action.2 Lang argues we noted in our previous opinion the only issue before us was whether the jury could have found her guilty of contributory negligence,

---

1 Lang's appellate bried was prepared pro se and presented sixteen issues on appeal. At oral argument, however, Lang was represented by James H. Lengel. Mr. Lengel conceded a number of issues Lang raised were not preserved for appeal, and basically abandoned all but three of Lang's issues. We address only these three issues. See, e.g., Battery Homeowners Ass'n v Lincoln Fin. Resources, Inc., 309 S.C. 247, 422 S.E. 2d 93 (1992) (issue may not be raised for the first time on appeal); S.C. Code Ann. 14-8-250 (Supp. 1994); Rule 220 (b) (2), SCACR (we need not address issues that are manifestly without merit).

2 Lang's attorney proffered at trial for the record on appeal attorney Grover Seaton's deposition testimony in which Seaton states Furr's failure to move for a directed verdict was a breach of the standard of care. Hence, the ruling was preserved for appeal.

thus implying we would have found her guilty of contributory negligence, thus implying we would not reach the issue of the sufficiency of the evidence because it was not preserved.

The trial court correctly ruled our prior decision in this matter necessarily obviated Lang's malpractice claim based upon Furr's decision not to move for a directed verdict. At the time of Lang's injury, contributory was an absolute bar to her recovery. See Nelson v Concrete Supply Co., 303 S. C. 243, 399 S.E. 2d 783 (1991) (contributory negligence abolished in favor of comparative negligence for all causes of action arising on or after July l, 1991). We held the record contained "sufficient evidence from which the jury could conclude Lang failed to take reasonable care and her actions contributed to the injury which would not have otherwise occurred." Lang v. Lady Int'l, Op. No. 89-MO-080 (S.C. Ct. App. filed May 31, 1989), cert. denied, (Sept 14, 1989), at 3. Hence, even if Furr had made a directed verdict motion, the trial court would have erred in granting the motion without allowing the jury to pass upon the contributory negligence defense. Accordingly, as a matter of law, Furr's failure to move for a directed verdict did not harm Lang and cannot serve as the basis for a claim of legal malpractice.

Lang also argues the trial court erred in dismissing her claims that Furr was quilty of malpractice for failing to move for a directed verdict in the Lady International case because Judge Sidney Floyd had already denied a similar motion at a pretrial hearing. This issue is meritless. The denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. Ballenger v Bowen, __S.C. __, 443 S.E. 2d 379 (1994). Denial of summary judgment does not establish the law of the cae and the issues raised

by the motion can be raised again at a later stage of the proceedings. Id.' see also McLendon v South Carolina Dept. of Highways & Pub. Transp., ___S.C.___, 443 S.E. 2d 539 (1994) (denial of a motion to dismiss, like the denial of summary judgment, does not establish the law of the cae, and the issue raised by the motion can be raised again at a later stage of the proceedings).

II.

Lang next argues ther trial court errd in granting Furr's motion in limine to exclude any reference by her expert legal witness, Grover Seaton, to specific ethical canons or ethical rules.3

The court granted Furr's motion in limine to exclude the evidence. This was not a final decision on the matter, and lang was required to proffer the testimony at trial to preserve the issue for appeal. State v Floyd, 295 S.C. 518, 369 S.E. 2d 842 (1988), South Carolina Dept. of Highways & Pub. Transp. v. Galbreath, ___S.C. __, 431 S.E. 2d 625 (Ct. App. 1993). Lang made no such proffer at trial, and has not explained in her brief on appeal exactly what evidence Seaton would have given about this issue.

Further, in response to Furr's motion to exclude references to ethical rules or canons, the trial cout ruled Seaton could testify "as to proper standard of care and that's it."

Seaton was qualified as an expert and testified extensively concerning the ways he believed Furr breached the standard of care. Assuming the court did in fact commit error in excluding the testimony, Lang has not demonstrated prejudice from the ruling,

See Otis Elevator, In. v. Hardin Constr. Co. Group,___S.C.---450 S.E. 2d 41 (1994) (absent a showing of prejudice, an appellate court will not reverse a judgment for an alleged error in the exclusion of evidence).

Finally, the Scope note to Rule 407, SCACR, which is intended to provide general orientation concerning the Rules of Professional Conduct, states:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide
>
> guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies They are not designed to provide to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal consequence of violating such a duty.
> duty of lawyers or the extradisciplinary

Therefore, we find no error in the trial court precluding Seaton from testifying about specific Rules of Professional Conduct or Canons of Ethics which Seaton felt Furr violated.

III.

Lang argues the court erred in dismissing her allegation that Furr breached his standard of care in excluding her from jury selection. Colonel Larkin Spivey, an antagonistic juror whom Lang would have asked Furr to strike, was therefore allowed on the jury, and in fact served as foreman. Lang claimed Spivey, a neighbor of hers, knew her son and did not like him.

Lang's expert, Seaton testified Furr had the responsibility to share juror information with Lang and allow her to participate in jury selection. Seaton stated Furr breached the standard of care by not allowing Lang's participation.

---

3 Ostensibly, Lang wanted to establish Furr's violation of canons and ethical rules amounted to violation of a statute, or negligence per se.

The trial court waited until the end of all the evidence before ruling on Furr's motion to dismiss this claim. The court stated:

> I think at best, Ms. Lang's anxiety, concern and disagreement with -- viewing it in a light most favorable to her, of Mr. Furr's performance as to the juror Spivey, was what I referred to earlier as bedside manner. I do not think that it meets the standard since (Seaton) could not say to a reasonable degree of legal certainty that would have affected the outcome, I'm going back now and grant ... defendant's motion for a directed verdict on that issue.

In effect, the court was saying that even if Furr breached the standard of care in excluding Lang from the jury selection process, Lang's expert, Seaton, could not state Furr's actions had any affect on the verdict, that is, the seating of the allegedly antagonistic juror led to the verdict against Lang.

On appeal, Lang did not challenge this ruling by the trial court; therefore, it is the law of this case. Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, ___S.C.___, 427 S.E. 2d 646 (1993).

We have reviewed Seaton's testimony and agree with the trial court that Seaton never stated Spivey's service on the jury affected the outcome of the earlier case. To recover in an action for legal malpractice, a plaintiff must establish three things: (1) the plaintiff has sustained injuries; (2) the defendant was negligent in one or more particulars; and (3) such negligence proximately caused, or at least was a contributing proximate cause. of the plaintiff's injuries. Shealy v. Walters, 273 S.C. 330, 256 S.E. 2d 739 (1979); see also Manning v. Quinn, 294 S.C. 383, 365 S.E. 2d 24 (1988) (the plaintiff must show that the action which the plaintiff claims the lawyer should have taken most probably would have been successful).

To presume Spivey's presence on the jury in the earlier case resulted in a unanimous jury verdict in favor of Lady International would be to engage in complete speculation, in view of Seaton's testimony. The jury in this case might draw that inference, but it would have no basis in the evidence. Accordingly, we affirm the trial court's dismissal of this allegation of malpractice from the case.

In summary, we conclude the judgment should be affirmed. As a final comment, we observe that "' {1} litigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials.'" Ketterman v S.C. Farm Bureau Mut. Ins. Co., 302 S.C. 276, 279, 395 S.E. 2d 187, 189 (Ct. App. 1990), cert. denied, (Sept. 27,1990) (Citation omitted). From our thorough review of the lengthy record before us, we find that although the trial may not have been perfect, Lang received a fair trial.

AFFIRMED.

SHAW, CURETON, and CONNOR, JJ., concur.

APPENDIX B

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Teena Lang, ...Appellant,

v.

Lady International, International Fitness Center, Inc., Living Well Lady and Living Well Fitness Centers. . . .Respondents.

Appeal from Horry County
Frank P. McGowan, Jr., Judge

Memonrandum Opinion NO. 89-MO-080
Heard April 11, 1989 Filed May 31, 1989

AFFIRMED

James L. Merritt, Jr., of Law Offices of O. Fayrell Furr, Jr., of Columbia, for appellant.

John B. McCutcheon, Jr., and Mary R. M. Baxter, both of McCutcheon, McCutcheon & Baxter, of Conway, for respondents.

SHAW, j.: Appellant, Teena Lang, sued respondents, Lady International, International Fitness Center, Inc., Living Well Lady, and Living Well Fitness Centers, for personal injuries

suffered at a health spa. The jury returned a verdict for respondents and lang appeals. We affirm.

Lang joined the Lady International health spa in April of May, 1984 and worked out at the club practically every day. On July 16, 1984, while exercising at a lateral pull-down station of a universal weight machine, Lang was injured. This particular machine consists of a lateral bar connected to a pully cable which is attached to a set of weights. At the time of the accident, the bar was connected to the pulley cable by an open-ended "S" hook. Lang completed her repetitions on the machine, stood up and released the bar thus allowing the weights to fall freely causing the bar to come loose from the "S" hook and hit her on the head.

Lang sued the health spa alleging negligence and gross negligence. Respondents answered with a general denial and alleged contributory negligence on the part of Lang. The case was submitted to the jury which returned a general verdict for respondents.

The sole issue on appeal is whether there is any evidence in the record which would support a finding of contributory negligence. While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record to support a finding of contributory negligence and therefore affirm.

The record shows the health spa has a policy of giving an orientation program to new customers during which they are shown how to use the various pieces of exercise equipment. Orientation includes instructions on the use of the lateral pull-down

machine and patrons are told not to release the bar suddenly while the weights are under tension with the cable.

Although denied by Lang, there is evidence in the record from which the jury could conclude she did go through orientation. Staff instructor, Starr Coley, testified Lang's program card indicated she was given an orientation program. Manager, Holly Dennis, testified one of their instructors, Karen Kostyskyn, sold Lang her membership and that Kostyskyn was notorious for giving orientation immediately upon selling a membership. Although Kostyskyn could not recall who gave Lang the orientation program, she stated Lang definitely went through one.

There is also ample evidence from which the jury could conclude Lang was instructed to release the bar on the lateral pull-down machine slowly and not to let the weights clang. Kostyskyn stated that, in giving an orientation, she always warned the patrons to let the bar up slowly even if it meant stepping up on the seat to return the weights to their proper position. Coley testified she instructed patrons to release the bar slowly so the bar would not fly up allowing the weights to clang. Dennis likewise stated she instructed the patrons to release the bar easily and not to drop the weights. Further, a patron of the spa, Amy Gwinn, testified she was told to let the bar back up slowly and never let the weights clang.

Finally, there is evidnece in the record from which the jury could find that Lang released the bar in a manner which contradicted the instructions given her. There were no eyewitnesses to the accident and Lang testified she was unsure what happened. However, Kostyskyn, Dennis and Gwinn were all

present in the spa at the time of the accident and each testified to hearing the weights drop or clang.

Lang argues that even if these instructions were given to her, they were inadequate as they were given only to protect the machine, prevent loud noise and allow the patron to receive the full benefit of exercise. She argues because the instructions were not given as a user safety consideration, injury was not something she anticipated and, therefore, failure to follow these instructions would not amount to contributory negligence. We disagree.

All that is necessary to establish the defense of contributory negligence is to prove to the satisfaction of the jury that the injured party id not, in his own interest, take reasonable care of himself and contributed, by this want of care, to his own injury. Woods v. Rabon, 295 S.C. 343, 368 S.E. 2d 471 (Ct. App. 1988. Under the facts of this case, we find the instructor's reasoning behind giving the instruction irrelevant. There is sufficient evidence from which the jury could conclude Lang failed to take reasonable care and her actions contributed to the injury which would not have otherwise occurred. AFFIRMED.

SANDERS, C.J. AND LITTLEJOHN, A.J., concur.

APPENDIX C
15a

THE SOUTH CAROLINA COURT OF APPEALS

Tenna Phipps Lang. . . . . .Appellant,

v.

O. Fayrell Furr, Jr.. . . . . Respondent.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and,hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

/s/ Curtis G. Shaw , J.

/s/ Jasper W Cureton , J.

/s/ Carol Conner

Columbia, South Carolina
August 23 , 1995.

APPENDIX D
16A

THE SUPREME COURT OF SOUTH CAROLINA
February 22,1996

REGULAR AND CERTIFIEDF MAIL

Mr. Tenna Phipps Lang
304 Club Drive
Myrtle Beach, S. C. 29572

Re: Tenna Phipps Lang v O. Fayrell Furr

Dear Ms. Lang:

This Court has issued the following Order on you Petition forWrit of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied."

February 22, 1996 /s/ Ernest A. Finney, Jr., C.J.
For the Court

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,BFS/dmh
/S/ Brenda F. Shealy
DEPUTY CLERK

BFS/dmh
Copy to: Charles J. Baker, III, Esquire
Stanley C. Rodgers, Esquire
The Honorable Kenneth Richstad
The Honorable Billie G. Richardson
West Publishing Company

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

May 22, 1996

Ms. Tenna P. Lang
304 Club Drive
Myrtle Beach, SC 29572

Re: Tenna Phipps Lang
v. O. Fayrell Furr, Jr.
application No. A-960

Dear Ms. Lang:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on May 22, 1996, extended the time to and including June 22, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By: /s/ Troy D. Cahill
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Notification List

Ms. Tenna P. Lang
304 Club Drive
Myrtle Beach, SC 29572

Mr. Charles J. Baker
200 Meeting Street
Suite 202
Charleston, SC 29401

Reba Mims
Court of Appeals of South Carolina
Calhoun State Office Bldg.
P.O. Box 11629
Columbia, SC 29211

Supreme Court, U.S.
FILED
JUL 25 1996
CLERK

(7)

No. 95-2063

In The

Supreme Court of the United States

October Term, 1995

TENNA PHIPPS LANG,

Petitioner,

vs.

O. FAYRELL FURR, JR.,

Respondent.

On Petition for a Writ of Certiorari to the South Carolina Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

I. Whether Petitioner's equal protection rights were violated in a state court legal malpractice action by an evidentiary ruling which excluded any reference by her expert legal witness to specific ethical canons or ethical rules but allowed extensive testimony concerning the ways in which the expert believed Respondent, as her attorney, breached the standard of care.

II. Whether South Carolina lacks a definitive standard of care relating to an attorney's communicating an offer of settlement to a client in a civil case and, if so, whether that serves to deny Petitioner equal protection.

III. Whether Respondent's alleged failure as Petitioner's attorney to allow her to participate in jury selection in a state court jury trial implicates any federal constitutional right.

IV. Whether Petitioner's equal protection rights were violated by the granting of a directed verdict to Respondent on the claim that he failed to allow Petitioner to participate in jury selection.

V. Whether Petitioner's equal protection rights were violated by a ruling that, as a matter of law, there was insufficient evidence of proximate cause to support her claim that the Respondent, as her attorney, had failed to move for a directed verdict in the underlying personal injury lawsuit.

VI. Whether Respondent's presentation of the testimony of the trial judge from the underlying personal injury lawsuit implicates any federal constitutional right.

VII. Whether the South Carolina Court of Appeals denied

Petitioner due process and equal protection in refusing to address her argument that there was insufficient evidence to support jury charges on the law of contributory negligence, assumption of risk and estoppel.

VIII. Whether any federal constitutional right of the Petitioner was violated by a jury instruction to the effect that the jury must accept the law as charged by the court and could not be concerned with what they thought the law should be.

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STATEMENT OF THE CASE

The Petitioner, Tenna Lang ("Lang"), instituted a personal injury lawsuit in state court against Lady International health spa, in which she was represented by the Respondent, O. Fayrell Furr, Jr. ("Furr"), a South Carolina attorney. That lawsuit resulted in a jury verdict for the health spa, which was upheld by the South Carolina Court of Appeals. Lang then brought a legal malpractice action in state court against Furr arising out of his representation of her in the earlier case. The jury in that trial found for Furr, and the court of appeals affirmed.[1] The South Carolina Supreme Court denied Lang's petition for writ of certiorari, and her Petition to this Court followed.

The facts of Lang's accident were stated concisely by the court of appeals in its opinion affirming the verdict for the health spa:

> Lang joined the Lady International health spa in April or May, 1984 and worked out at the club practically every day. On July 16, 1984, while exercising at a lateral pull-down station of a universal weight machine, Lang was injured. This particular machine consists of a lateral bar connected to a pulley cable, which is attached to a set of weights. At the time of the accident, the bar was connected to the pulley cable by an open-ended "S" hook. Lang completed her repetitions on the machine, stood up and released the bar, thus allowing the weights to

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1. The opinions of the court of appeals in the malpractice case and in the personal injury case are attached to the Petition as Appendices A and B, respectively. References in this brief will be made to the consecutively numbered pages 1a-14a of the Appendices, which contain the two opinions.

fall freely, causing the bar to come loose from the "S" hook and hit her on the head.

* * *

The record shows the health spa has a policy of giving an orientation program to new customers during which they are shown how to use the various pieces of exercise equipment. Orientation includes instructions on the use of the lateral pull-down machine and patrons are told not to release the bar suddenly while the weights are under tension with the cable.

Although denied by Lang, there is evidence in the record from which the jury could conclude that she did go through orientation. . . .

There is also ample evidence from which the jury could conclude Lang was instructed to release the bar on the lateral pull-down machine slowly and not to let the weights clang. . . .

Finally, there is evidence in the record from which the jury could find that Lang released the bar in a manner which contradicted the instructions given her. There were no eye-witnesses to the accident and Lang testified that she was unsure what happened. However, Kostyskyn, Dennis and Gwinn [employees of the spa] were all present in the spa at the time of the accident

> and each testified to hearing the weights drop or clang.

(App. at 12a-14a).[2]

In August 1985, Furr filed a complaint on Lang's behalf against the health spa and the manufacturer of the exercise equipment, alleging that both were liable for negligence and praying for $5 million in damages. Through discovery, it became apparent that the manufacturer had designed and sold the machine with a proper attachment and that the "S" hook was a modification to the machine made by the health spa itself. Contrary to Lang's implied assertion in the Petition that Furr unilaterally released the manufacturer from liability (Petition at 3), Lang authorized a settlement with the manufacturer for $25,000, and the case proceeded to trial against the health spa alone.[3]

The case against the health spa was tried over the course of three days in October 1987. One of the jurors selected for the trial was Larkin Spivey, who was a neighbor of Lang and whose daughter was a friend of her son. Lang would later testify in the malpractice case that she did not receive a jury list prior to trial and, because Furr told her to go to the wrong courtroom, she was not present when the jury was drawn and struck. She would further testify that she would have insisted Furr exercise a

---

2. Thus, contrary to Lang's assertion in the Petition that her injury occurred during "ordinary use" of the machine (Petition at 2), there was specific evidence in the record from which a jury could have concluded that she recklessly disregarded the instructions given her for use of the exercise equipment.

3. In the malpractice case, Lang made no claim based on an alleged unauthorized settlement with the manufacturer.

peremptory strike against juror Spivey because he did not like her family, principally because of the friendship between his daughter and her son, although her son, in his testimony, could not give a specific reason for Spivey to dislike him.[4] In addition, Furr would later testify in the malpractice case that Lang was present during jury selection, that he believed he should exercise a peremptory strike on Spivey and that it was actually Lang and her family who wanted to retain Spivey as a juror because the two children were friends. The attorney for the health spa corroborated Furr's testimony that Lang was present during the striking of the jury. The statements in the Petition to the effect that Furr intentionally directed Lang to the wrong location for jury selection and that Spivey intentionally concealed his antagonism toward Lang and her family (Petition at 16-17) have no basis in the evidence.

During the trial of the personal injury case, the health spa's attorney made a firm settlement offer of $550,000.[5] Lang would later claim in the malpractice case that she was completely unaware of any settlement offer made by the health spa. This question was the central fact issue in the trial of the malpractice case. According to Furr, however, and as corroborated by at least two other witnesses, Lang was fully aware of the outstanding settlement offer and rejected it. The question was presented to the jury at the malpractice trial, and the jury believed Furr.

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4. Spivey later testified in the malpractice case, however, that he bore no bias, prejudice, ill will or malice against Lang or her son and that he believed he was capable of giving both Lang and the health spa a fair and impartial trial.

5. Counsel for the health spa clearly testified in the malpractice action that the highest offer ever actually made by the defense was $550,000, contrary to the assertion in the Petition that settlement offers ranged from $550,000 to $900,000. (Petition at 11). Furr testified that, although there was some discussion about whether defense counsel would seek $750,000 in authority, Lang would not lower her demand below $3 million and, therefore, negotiations broke down.

Several purported factual assertions in the Petition relating to the evaluation of the personal injury case and the settlement considerations are completely without evidentiary support. First, the statement that Furr had specific actual knowledge of the personal belief of counsel for the health spa as to the chances of winning the case (Petition at 13) is without evidentiary support and contrary to common sense since few defense counsel would so openly share their opinions with a plaintiff's lawyer. Second, the statement that the calculations by Lang's expert economist of her financial loss amounted to over $7 million (Petition at 3) is simply false, and the record reflects that his actual calculations as presented at the trial of the personal injury case were slightly in excess of $2 million. Last, the references to the financial status of Furr and his wife and to news coverage of the personal injury trial are completely uncalled for and absolutely irrelevant to these proceedings. Further, there was absolutely no evidence presented at the trial of the malpractice case concerning these matters.

Contrary to Lang's constant references in the Petition to her serious and permanent injuries and to her permanent disability, the extent of her injury was very much in dispute in the personal injury case, and her own doctors at that time opined that, despite a laceration to the head, her main injury was an emotional and psychiatric one, including a diagnosis of post-traumatic stress disorder. In fact, at the trial, the health spa presented the expert testimony of a psychiatrist, who, after reviewing Lang's medical records and examining her, opined that there was no physical basis for Lang's symptoms, that Lang was treatable (not permanently disabled) and that Lang was deliberately exaggerating her injuries.

At the close of the evidence in the personal injury trial, Furr consciously made a tactical decision on the spur of the moment not to move for a directed verdict because he felt that Lang was

winning the case at that point and he did not want to remind defense counsel to make such a motion, thereby providing a basis for an appeal by the defense. The jury returned a verdict for the health spa. Furr appealed on Lang's behalf, and the South Carolina Court of Appeals affirmed, holding that there was sufficient evidence from which the jury could have concluded that Lang was guilty of contributory negligence. (App. at 11a-14a).

Lang filed the malpractice action against Furr in August 1991, alleging in pertinent part that Furr had been negligent in handling the personal injury case by (1) failing to move for a directed verdict, (2) failing to advise her of the settlement offer and (3) excluding her from participating in jury selection.[6] Contrary to Lang's assertion in the Petition that the trial judge in the malpractice case granted four directed verdict motions (Petition at 3), the trial court withheld only two claims from the malpractice jury's consideration. First, the trial court granted Furr's motion *in limine* to exclude evidence of his failure to move for a directed verdict in the personal injury trial. The trial court decided, as a matter of law, that the lack of a directed verdict motion did not proximately cause any harm to Lang since the health spa's liability was necessarily a jury issue as established by the court of appeal's prior decision holding that there was sufficient evidence of contributory negligence. (App. at 4a-5a). Second, at the close of all the evidence at the malpractice trial, the trial court granted Furr's directed verdict motion on Lang's claim regarding the handling of the jury selection process since there was insufficient evidence as a matter of law that Spivey's service on the jury affected the outcome of the personal injury case. (App. at 8a-10a).

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6. Throughout the malpractice action, including the trial, Lang was represented by counsel.

The trial court in the malpractice case also granted Furr's motion *in limine* to exclude any reference by her expert legal witness to specific ethical canons or ethical rules but, contrary to Lang's misrepresentation in the Petition that her expert was prevented from explaining the specific standard of care (Petition at 5), allowed the expert to testify extensively concerning his opinion of the specific breaches of the standard of care. (App. at 6a). During the trial of the malpractice case, Furr called as a witness The Honorable Frank T. McGowan, Jr., who had been the trial judge for the personal injury lawsuit. Judge McGowan was an important witness because, despite Lang's denial, he testified that, during the trial of the personal injury lawsuit, with the consent of all parties, he spoke with Lang concerning the settlement offer to assure himself that Lang understood it was a substantial offer and to urge her to consider it. Like any other witness, Judge McGowan was subpoenaed to attend the trial, and his testimony was relevant and entirely proper. The statement in the Petition that Lang was surprised by Judge McGowan's appearance at the trial is belied by her complaint that he was not available for her counsel to depose, which indicates that she knew he might be called as a witness. (Petition at 27).

The jury returned a verdict for Furr in the malpractice case, and Lang appealed. Although Lang appeared *pro se* throughout much of the appeal process, at oral argument she was represented by South Carolina attorney James H. Lengel. The court of appeals affirmed the jury verdict for Furr on July 18, 1995. In doing so, it addressed only the following three issues, finding that the other issues presented in the brief were either not preserved for appeal, abandoned or manifestly without merit: (1) the exclusion of evidence relating to Furr's failure to move for a directed verdict in the personal injury trial; (2) the exclusion of any reference by Lang's expert witness to ethical rules; and (3) the directed verdict on the claim that Furr allegedly excluded Lang from participation in jury selection. None of the issues

actually decided by the South Carolina Court of Appeals involved any question of federal law.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION OVER THE CLAIMS PRESENTED BECAUSE THEY WERE NOT PROPERLY RAISED IN STATE COURT.

The jurisdiction of this Court is limited to specific instances of denials of federal rights, specially set up in state court and denied by the rulings and judgment of the state court. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). *See also New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) (jurisdiction lacking unless the federal question presented was raised in state court and denied there). To establish jurisdiction, the rules of this Court require that a petitioner specify when the federal questions sought to be reviewed were raised in the state trial and appellate courts, the method or manner of raising them and the way in which they were ruled on by those courts. Rule 14.1(g)(i), United Supreme Court Rules.

The Petition in this case contains absolutely no statement of when Lang raised in the South Carolina state courts the issues that she now presents. This is so because Lang utterly failed to preserve any of the questions for which she seeks review. The actions of the state courts to which Lang now takes exception fall into four basic categories: (1) never challenged on any ground in the state trial or appellate courts (Question II); (2) challenged on state grounds only in the state appellate court but not challenged or properly preserved in the trial court (Questions I and VI); (3) challenged on state grounds only in the state trial and appellate courts (Questions III, IV, V and VII); and (4) challenged on

federal constitutional grounds in the state appellate court but not on any ground in the trial court (Question VIII).

With one exception, Lang has never raised a federal question prior to the Petition to this Court. The one constitutional question that she did raise in the state appellate court concerned a jury instruction to the effect that the jury must accept the law as charged by the court and could not be concerned with what they thought the law should be. Lang did not object to this jury instruction at trial, and the South Carolina Court of Appeals did not address the issue in its opinion since it was not properly preserved. (App. at 4a). Therefore, this Court lacks jurisdiction of this purported constitutional question. *Louisville & Nashville Railroad Co. v. Woodford*, 234 U.S. 46 (1914) (jurisdiction lacking where highest state court declined to pass on question because not appropriately raised in trial court in the manner required by state practice).

The Court should deny Lang's Petition on jurisdictional grounds because she did not properly preserve any federal questions for review.

II.

THIS COURT ALSO LACKS JURISDICTION BECAUSE NONE OF PETITIONER'S CLAIMS PRESENT A COLORABLE FEDERAL QUESTION.

This Court is without jurisdiction where the assertion that a federal question exists is devoid of merit and without substance. *See New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902) (appellate jurisdiction).

The equal protection and due process concerns raised by Lang are blatantly frivolous. The matters of which she complains

relate to evidentiary rulings under state law (Questions I and VI); state substantive law as to the standard of care for attorneys in legal malpractice actions (Question II); and rulings on the sufficiency of evidence either to support a claim (Questions III, IV and V) or to support a jury instruction (Question VII). These issues do not implicate Lang's federal constitutional rights in any conceivable way.

Lang's last question (Question VIII) challenges the state trial court's jury instruction to the effect that the jury must accept the law as charged by the court and could not be concerned with what they thought the law should be.[7] Lang asserts that a jury has the right to decide the law as well as the facts. This is not a federal constitutional question. In some instances, pursuant to express state statutory or constitutional provisions, juries in certain criminal trials are allowed to determine the facts and the law. 75A Am. Jur. 2d *Trial* § 813 (1991). This principle, however, is a departure from the general rule that the court and jury have separate and distinct functions, that is, for the court to be the sole arbiter of the law and the jury of the facts. 75A Am. Jur. 2d *Trial* §§ 714 and 715 (1991). Furthermore, the Seventh Amendment to the United States Constitution, which preserves the right to trial by jury, is not applicable to proceedings in state court. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); 47 Am. Jur. 2d *Jury* § 5 (1995). In addition, Lang's position is wrong on the merits since, under South Carolina law, the jury instruction was correct. *See* S.C. Const. art. V, § 17 (1973) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law").

Because Lang does not present a colorable claim that she was denied any federal constitutional right, this Court should deny the Petition for lack of jurisdiction.

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7. As discussed in part I of this brief, Lang did not object to this jury instruction at trial.

III.

THE COURT SHOULD DENY THE PETITION, IN ITS DISCRETION, SINCE THE SOUTH CAROLINA COURTS DID NOT DECIDE ANY QUESTIONS OF FEDERAL LAW.

This Court's rules provide that a petition for writ of certiorari will be granted only for compelling reasons and generally only in certain situations, including but not limited to those in which a state court of last resort (1) has decided an important federal question in a way that conflicts with a decision of another state court of last resort, with a decision of a United States court of appeals or with relevant decisions of this Court or (2) has decided an important question of federal law that has not been, but should be, settled by this Court. Rule 10(b) and (c), United States Supreme Court Rules. Further, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, United States Supreme Court Rules. Given these considerations, the Court should deny this Petition.

A review of the South Carolina Court of Appeals' opinion plainly indicates that it did not actually decide any issue of federal law. (App. at 1a-10a). Therefore, that court's opinion necessarily does not conflict with other applicable decisions. Further, the errors asserted by Lang are simply reconstituted challenges to the state courts' evidentiary rulings and rulings as to the sufficiency of evidence. The court of appeals rendered no decision on any question of federal law because none was ever properly presented to it. Given the lack of any state court decision on a question of federal law, the Court should exercise its discretion to deny the Petition.

CONCLUSION

In summary, this Court lacks jurisdiction of the questions presented by Lang. Not only did she fail to properly raise these issues in state court, but the questions presented also fail to present a colorable claim that she was denied any federal right. Last, since the state appellate court did not actually decide any federal questions, the issues are not appropriate for this Court's discretionary review. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

Docket No. 95-2063

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Tenna Phipps Lang, *Petitioner*,

v.

O. Fayrell Furr, Jr., *Respondent*.

On Petition for a Writ of Certiorari to the South Carolina Court of Appeal

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REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

I. Whether Petitioner's equal protection rights were violated in a state court, by court actions in a legal malpractice action by court rulings which excluded reference, by her expert witness to specific ethical canons or ethical rules for the jury to use as a benchmark by which to gauge the performance of an attorney -- leaving the jury only guesswork. Jurors are rarely equipped to weigh the value of expert testimony.

II. Whether South Carolina lacks a definitive standard of care relating to an attorney's communicating an offer of settlement to a client in a civil case and, if so, whether that served to deny Petitioner equal protection of the laws.

III. Whether Petitioner's participation in juror selection must be considered a fundamental right, and whether factual issues in dispute must go to the jury.

IV. Whether Petitioner can be held to an untenable standard when her equal protection rights were violated by the granting of a directed verdict to Respondent on the issue that he failed to allow Petitioner to participate in jury selection and that he selected a hostile neighbor, Spivey, who served as foreman, over her objection. State Court of Appeals erroneously ruled she could not prove if Spivey had not been on the jury that she would have won. Yet, Appellate court judges agreed at oral argument there is no way to prove that. Factual issues in dispute must go to jury.

V. Whether Petitioner, as a Pro se litigant, has been denied equal protection of the law through the misapplication of South Carolina Rules of Civil Procedure and through erroneous actions of the Appellate Court of South Carolina

using res judicata/collateral estoppel to grant Respondent's directed verdict motion on his negligence for failing to move for a directed verdict during the trial to preserve Petitioner's rights on appeal. Rule 50 SCRCP.

VI. Whether Petitioner was denied her Constitutional Right to a "fair" trial by Respondent's calling of the trial judge (in the underlying case) by surprise, to testify, even after he was continually unavailable for deposition by Petitioner under color of being judicially "busy," thus denying Petitioner's right to deposition testimony required for discovery and to prepare questions for cross examination at trial. SCRCP

VII. Whether the South Carolina Court of Appeals denied Petitioner due process and equal protection of the laws in refusing to address her arguments; contributory negligence, assumption of the risk, and res judicata/collateral estoppel where no evidence had been presented at trial to support the jury charge and where the jury charges were simply not available.

VIII. Whether the Petitioner was denied her Constitutional Right when the trial judge charged the jury that they could not be concerned about what they may think the law should be but, for this case, only with what he charged the law to be.

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III. This case is especially right for court intervention because **the Standard, the Rules, and the Law** has been **misapprehended and grossly misapplied**. 9

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STATEMENT OF THE CASE

Arguments in Respondent's Brief are meaningless and non-responsive to the case of *Lang v Furr,* because independent arguments irrelevant to the matter can not be used as the basis for determing the proper application of law in this case.

Lady International Fitness Center had undisputedly mis-assembled the exercise equipment which injured Plaintiff by disregarding the manufacturer's directions.

Respondent takes comfort from the Court Opinion[1] implying Plaintiff "caused" the exercise bar to come loose from it's assembly. No such thing as "releasing and causing *anything* to happen"provoked the accident.Spa testimony confirmed this claim and after the accident, the spa added a remedial extension chain and closed "S" hook. The "Spa" testified they had no maintenance man and that they had repeatedly warned that the equipment was dangerous. Cables wore out prematurely before breaking.When Petitioner testified she was "unsure"what happened; she was testifying regarding whether the cable broke, or the part attached to its cable had broke and later, during discovery, learned about the "S" hook,and whether the "S" hook had broken.

Contrary to Respondent's assertion, that "there was specific evidence from which a jury could have concluded that she recklessly disregarded the instructions...," the fact is, except through innuendo and exaggeration Respondent has not and cannot cite any specific testimony to that effect.

Spa personnel gave beneficial testimony in hindsight furnished to protect their jobs, only showing that they intended to give the orientation, and this was something they normally did,[2] but no sworn witness ever said Lang was "trained"on a given date. Spa personnel testified that during such "orientation," instruction not

[1] Opinions of the court of appeals in the malpractice and in the personal injury case are attached to the Petition as Appendices A and B, respectively. References in this brief will be made to the pages 1a-14a of the Appendices, containing the two opinions.

[2] Karen, Spa assistant mgr, sold Lang her membership and testified that she could not remember giving Lang an orientation. Lang joined the Spa a month prior to the accident. There is no testimony in the record that Lang was given an orientation.

to clang the weights was given only because that wears out the weights by clanging them together and not for safety reasons. This certainly does not prove contributory negligence. A.12-13a

Respondent p. 4, says: "That Furr intentionally directed Lang to the wrong location for jury selection and that Spivey intentionally concealed his antagonism toward Lang and her family have no basis in the evidence." That statement is completely false. Counsel agrees with the highly disputed issues on the jury and juror Spivey but avoids the question of the directed verdict on the disputed fact that, by law, jury must decide. (Petition at 14-21)

Petitioner was indeed denied participation in jury selection and Furr chose an unfriendly neighbor who served as foreman. During *voir dire*, Spivey concealed he knew Plaintiff and that he disliked her son because of his daughter's relationship with the son. Spivey served in 1987 and returned to testify for Furr in the Legal Malpractice case, *Lang v Furr*, in 1993, to protect Furr by "remembering"six years later what he (Spivey) should have said and done during *voir dire* in 1987(R p.4) Is counsel trying to convince the court that this is the standard? Petitioner's expert witness, Seaton, testified at deposition p. 83: **"Based on the facts given to me from the jurors who participated in the deliberations, Mr. Spivey was the leader against Ms. Lang in jury argument, and successfully led that argument to a verdict for the defendant."**[3] The other jurors were interviewed but the judge granted Respondent's motion *in limine* to disallow any reference or statements from the other jurors.

That Furr intentionally mis-directed Lang and that Spivey intentionally concealed his antagonism toward her and her family is supported by the trial transcript and *voir dire*. Nonetheless, the juror and jury issues were highly disputed issues of fact that should have gone to the jury.[4] However, the trial judge granted

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[3]Lang's attorney proffered Seaton's deposition at trial for the record on appeal.

[4]"...In order for a directed verdict to be proper, it not only must be clear that no issue of fact is involved, but the conclusions and inferences to be drawn from the facts must be undisputed as well..." *Garrett et al v Snedigar et al* 359 SE 2d 283 (SC CA 1987). "In determing whether there

Furr's Directed Verdict Motion removing the issue from consideration by the jury in direct conflict with the laws and rules of civil procedure. A litigant's participation in juror selection must be considered a fundamental, personal, constitutional right. And factual issues in dispute must go to the jury. Respondent said p 4-5: "Several purported factual assertions... are completely without evidentiary support." ..espondent's statement is completely false and when a party is convicted of advancing a falsehood, no part of his later assertions can carry much believability. Contrary to his allegations, the consideration and losses in Lang's petition are as follows:

(1) Respondent's own pretrial brief, which said on line 10. "State damages (please total the amount of damages) $7,158,306.00 prepared and signed by Respondent 8-26-1987,"

(2) Respondent's pretrial brief, stating on line 13. "Absolute minimum or maximum amount which attorney can, in good faith, recommend to client in settlement: $5,000,000.00," and

(3) Respondent's Plaintiff's Exhibit ID 15 AH 10-27-87 #913 -- an analysis chart of Lang's losses which was presented to the court during the trial of *Lang v Lady International.*

(4) Respondent's own testimony R p. 635, L. 10-16. "The $750,000.00 in this case I think is great; but if we get a verdict we could get a big one. And that is what I told her."

Q. You didn't make any notes or document that? A. No.

Q. Did you present that offer to her in writing? A. No.

(5) Respondent's witness Economist Wood testimony R.p.396

Q. And it's your recollection the figure was seven hundred and fifty thousand dollars ($750,000.00)? A. Yes, it was.

(6) Plaintiff's Expert Seaton, questioned by Mr. Baker, defense Attorney. Q. My question is: Did Mr. McCutcheon tell you when you talked to him about this case an offer of $500,000 had been communicated to Ms.Lang Attorney before the first pretrial?

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are material issues of fact on a motion for summary judgment, all inferences from facts must be viewed in light most favorable to the party opposing the motion; accordingly, summary judgment is inappropriate if facts are conflicting..." *Alston v Blue Ridge Trading Co.* 108 S.C. 292(S.C.1992)

A. I can't tell you that without -- with absolute clarity. All I know is prior to this case being tried Mr. McCutcheon assured me, in whatever form, that there was sufficiency of time for the Plaintiff and attorney to consider the offer of $500,000. And quote,he said he "had authority up to $900,000 to settle the case.

(7) Judge McGowan testified R.p. 379 l. 15-19: "and I was pushing and urging the lawyers to meet somewhere in between Nine Hundred Thousand and a Million Dollars ($900,000 to $1,000,000), and that's what I felt at that point was something that I continued to urge upon the attorneys as strong as I could."

Petitioner did not have any idea of the purported settlement offers; affirming this, she testified (R.198, L. 14-15) "If the Five Hundred and Fifty Thousand Dollars ($550,000.00) had been offered to me, I would have accepted it." (Petition at 13)

Respondent p.5 is over-reaching when he irrelevantly challenged Lang's injuries. Respondent, himself, convinced the judge *in limine* in *Lang v Furr* to disallow testimony pertaining to Lang's permanent injuries. Seaton's deposition testimony is: Lang was excluded from all proceedings and based on these actions by Furr which tend to show that he had questions about her competency, physical condition, or mental condition, then the ethical cannons mandate that he appoint a Guardian Ad Litem. Question: Furr should have appointed a Guardian Ad Litem? Furr did not want to address that issue. The Respondent did not want to "retry" the personal injury case or make any reference to Lang's "permanently disabled" status. Yet, Lang was declared permanently medically and physically disabled by the Social Security Administration in 1985 as a result of the accident at the Spa which forced her to close her business reducing her income from $100,000 per year to social security disability of $8,220, contrary to Respondent's directed verdict motion P.7 granted *in limine* disallowing any reference by Seaton to specific ethical cannons or rules..[5] Further testimony by Seaton showed the judge

[5]Judge Posner,US Court of Appeals 7th Circuit said: not many judges and even fewer jurors are equipped to weigh the value of expert testimony ... They're entitled to "real science." The

was protecting Furr (Petition 5-10). Seaton testified at deposition p.52 L.8-25. Baker Q. The Complaint contains two causes of action; one for breach of contract, and one for malpractice. In your opinion, are both governed by the standard of care in the breaches that you opine; is there some difference as to which--A. Yes. There is, of course, as you know, statutory violation, which would be negligence, per se. Q. What statutory violations have there been? A. The ECs. Q. Are they statutes in your opinion? A. My opinion, they set a standard for a particular class of persons as attorneys. And the violation of those, in my opinion, would be treated as a statutory violation as negligence, per se, and would give a right to I believe, for the trial judge to charge as to punitive damages, sir.

On p.5: Judge McGowan was unavailable for deposition by Petitioner under color of being judicially"busy." It certainly was surprising that he could leave his courtroom (a special one week assignment) in Marion (fifty miles away), holding up court while he appeared live to testify for Furr. JudgeMcGowan dodged deposition and denied Petitioner's right to deposition testimony required for discovery and necessary to prepare questions for trial. SCRCP. McGowan evaded the question whether Lang was aware of settlement offers yet furnished confusing/misleading testimony to thc jury to protect Furr. Defense attorney testified that he made the offers to Furr and each time Furr left the room, came back in a few minutes, and rejected the offer. He assumed, not "knew," that Furr had communicated the offers to Plaintiff.

On p.6, says: "Furr... made decision on spur of the moment not to move for a directed verdict because he felt that Lang was winning the case at that point and he did not want to remind defense counsel to make such a motion...."Only in retrospect does he say that. Furr's negligence was a gross failure[6] to preserve

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court-room is not the place for, scientific guesswork, even of the inspired sort. Law lays science, it does not lead it. (1993)

[6] "The requirement of a proper directed verdict motion as foundation for a motion for judgment notwithstanding the verdict is not a mere technicality but serves vitally important interest in the fair conduct of litigation." Federal Rules Civil Proc.Rule 50

Petitioner's rights to argue, on appeal, the heart of her case, negligence and gross negligence by the Spa, it wiped out her position in the appeal of *Lang v Lady International.* At App.11a, *Lang v Lady International,* the Appellate Court said, "The sole issue on appeal is whether there is any evidence in the record which would support a finding of contributory negligence. **WHILE APPELLANT FAILED TO DRAW AN EXCEPTION CHALLENGING THE POSSIBLE FINDING FOR RESPONDENT BASED ON ITS GENERAL DENIAL** (emphasis added) we find there is sufficient evidence in the record." The **Appellate Court opinion above is in direct conflict with the South Carolina Supreme Court's earlier ruling in appeal granting the Spa's motion to dismiss this issue and removing related trial transcript from the record on appeal.**[7] The appeal should have ended at that point. Thereafter, the **Appellate Court had no legitimate jurisdiction or mechanism for ruling.** Its ruling could serve no purpose but to protect Furr should later action be taken against him and judge McGowan. The Court formulated its opinion to forestall Lang's options. The Court of Appeals ruling is directly in conflict with the rules and rulings of this court. (Petition 22-25)

Furr claimed res judicata/collerateral estoppel on Plaintiff's issue of Furr's failure to move for directed verdict in *Lang v Lady International.*[8] Petitioner's pleadings and the judgment in the first lawsuit actually showed res judicata does not apply in the present case, *Lang v Furr*, because the parties in the second lawsuit (for purposes of claims and/or causes of action in the second lawsuit) were neither "identical" to or in "privity" with the parties in the first; because the claims and/or causes of action in prior and

(a,b),28U.S.C.A. Rule 50 Rules of Civil Procedure "...As this is an action of law, we have under the Constitution (Amendment VII), U.S.C.A. Const. Ament 7, no jurisdiction to review or reexamine the facts, but can consider only questions of law.

[7]In the absence of a motion for judgment in favor of defendant, or other similar proceeding challenging the sufficiency of the evidence, no question of law is presented for our consideration..."" *Een v Consolidated Freightways* 220 F. 2d 82.

[8]Rule 50 South Carolina Rules of Civil Procedure.

present lawsuit are not "identical; and because the "precise point" adjudicated in the first lawsuit is not the "same" as the "precise point" of the claims and/or causes of action in the second.[9]

"Absent complete identity of the parties or indisputable privity, res judicata requires that the precise point(s) in the second lawsuit must have been adjudicated in a previous judgment in order to claim a preclusive effect from that judgment".[10] The judgment in the first case *Lang v Lady International* did not address or adjudicate any of the "precise points,"issues, claims, and/or causes of action in the second case *Lang v Furr*. First case was a personal injury, second case -- a legal malpractice.

"... the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and it is not to be applied so rigidly as to defeat the ends of justice[11] or so as to work an injustice.[12]" In addition, Respondent never proved res judicata-collateral estoppel, he simply "claimed,"entitlement to it based on the judgment in *Lang v Lady International*. Respondent argued that it would not have made any difference what Furr didn't do; claiming the court would have still ruled the same but this misses the point. "...Self-serving declarations and opinions of counsel can not be used as the basis for determining the proper application of collateral estoppel."[13] The precise question raised in the second law suit "Furr's negligence in failing to make a directed verdict motion" was not adjucated in the first. Judge

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[9]See *Bell v Boyd*, 252 SC 289, 166 SE2d 104 (1969) " The essential elements of res judicata are identity of the parties, identity of the subject matter, an adjucation, on the merits, in the former suit of the precise question sought to be raised in the second suit."

[10] Am Jur 2d does not stand alone in this regard. C.J.S. said:"In order that this rule [res judicata] may be applied, it must clearly and positively appear, either from the record itself, or by the aid of competent extrinsic evidence that the precise point or question in issue in the second suit was involved and decided in the first."

[11] *Smith v Pinner*, 68 Ariz 115, 201 P2d 741(overld in part on other grounds by *Marchall v Superior Court of Maricopa County*, 131 Ariz 379, 641 P2d 867); *In re Guardianship of DiCarlo* 3 Cal 2d 225, 44 P2d 562, 99 ALR 990, *McGaffey v Sudowitz* (th Dist) 189 Cal App 2d 215, 1`0 Cal Rptr 862.

[12] *Beverly Beach Properties, Inc. v Nelson* (Fla) 68 So 2d 604, 41 ALR2d 1071.

[13]Walton v State,(Tex App Houston (14th Dis) SW2d 488.

McInnis, in *Lang v Furr*, ignored the rules of collateral estoppel, denying Petitioner her constitutional rights to due process and equal protection of the laws, granting Respondent's directed verdict motion in *limine*. The Appellate Court, also ignoring the rules, affirmed this erroneous ruling. (Op. 5a)

Reply to Respondent's reasons for denying the writ

I.

Respondent's argument is incorrect. Respondent says: "this court has no jurisdiction over the claims presented because they were not properly raised in state court."

Petitioner **has** asserted these claims in the State Court of Appeals, her motion for rehearing, and the Petition for a Writ of Certiorari to the South Carolina Supreme Court; "fundamental fairness," constitutional rights, and the proper foundation for this claim has been made in the State court and denied. **It's not a question of a federal law; it is a federal question of constitutional rights to due process and equal protection of the laws.**

This claim is asserted based on cumulative effect of various Court rulings below; it is a question of constitutional rights to due process and equal protection of the laws. Title 28 USC. 3.2 Certiorari Jurisdiction Over State Courts Under1257. The Supreme Court has jurisdiction to review cases in state courts by way of certiorari... (3)"where any title, right, privilege, or immunity is specially set up or claimed under the Constitution... of... the United States."

Until the action was done, Petitioner had no way to know the courts were going to deprive her of her rights. **It's the courts' action, itself, denying due process and equal protection of the law to a citizen and a *Pro se* litigant which is at issue.**

"'Fundamental fairness' of the entire trial, based upon the cumulative effect of various trial court rulings, may properly await the conclusion of the trial." In *Chambers v Mississippi*, 410 U.S. 284, 290-91 n.3 (1973), the Court held that such a Fourteenth Amendment claim "is properly before us," despite the fact that it had first been asserted below in a motion for a new

trial after the trial had concluded. That claim was asserted on the basis of the cumulative effect of several evidentiary rulings during the trial, to which non-constitutional objections had been made. The Court noted that a federal claim could not have been raised and ruled upon prior to the conclusion of the defendant's evidentiary presentation.

Both lawyers and South Carolina courts have far exceeded the bounds of the Rules of Civil Procedure. **Misapplication of the Rules "under color of State law, custom, and usage"** deprived Petitioner of her Constitutional Rights by depriving her of due process and equal protection of the laws. Due process consists of a "fair"opportunity to present a case before a "fair" tribunal. By misapplying and/or abusing those rules, Respondent deprived Petitioner of her right to a "fair" trial and of her Constitutional right to due process, equal protection, and application of the laws. The Rules of Civil Procedure provide explicit guidelines for civil litigation. The respondent and the courts misapplied, violated, and/or abused those Rules so as to deprive Plaintiff of equal protection of the laws.

II

Respondent says: "This court also lacks jurisdiction because none of petitioner's claims present a colorable federal question."

Petitioner's claims do present a colorable issue because when parties act under color of state <u>custom</u> or <u>usage</u> such as in abusing or misapplying legally enacted South Carolina Rules of Civil Procedure, it's the same as if they had acted under a defective statute. This case is especially ripe for court intervention because the rules have been misapprehended and grossly misapplied.

III

Respondent said: "The court should deny the petition, in its discretion..." It's not a question of Federal Law; **it is a question of constitutional rights to due process and equal protection of the laws.** Respondent's claim is irrelevant to this case. Supreme Court Rule 4.17 Erroneousness of decision below:

"...The court's aim, rather, is to resolve the conflicts among the lower courts and to determine questions of importance. But on occasion the Court does accept a case for review for no apparent reason other than error in the lower court decision.[14] *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

In *Williams v Lee*, 358 U.S. 217, 218 (1959), certiorari was granted because of a "doubtful determination" by the court below " of the important question of state power over Indian affairs" and in *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968), certiorari was granted because "these [erroneous] rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." See also *New York Transit Authority v Beazer, 440 U.S. 568, 571 (1979)* Despite this reluctance to grant certiorari solely to correct an erroneous decision below, the Court does sometimes grant review simply to correct an error committed by a lower court.[15]

There are instances where the Court seemingly grants review. . . to correct an error in a state court's application of settled federal constitutional doctrine. *Florida v Rodriguez*, 469 U.S. 1, 12 (1984), where Justice Stevens in dissent stated review was granted "to undertake de novo review of the factual findings of a state [trial] court" that, in the Court's words, reflected "a misapprehension of the controlling principles of [Fourth Amendment] law."

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[14] Justice Rehnquist, in an address given at the Mercer University School of Law in 1983, states: "[A] grant of certiorari by the Supreme Court to review a decision of a lower court suggest that the case at issue is a genuinely doubtful one. The winning party in the court below has the benefit of a decision by that court on exactly the same issues which will be decided by the Supreme Court. Nonetheless, the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court." Justice Rehnquist, "Oral Advocacy: A Disappearing Art," 35 Mercer L. Rev. 10125, 1037 (1984).

[15] ... certiorari may be granted "if the Court can be persuaded (1) that the lower court was very likely wrong and (2) that the error will have serious consequences soon." S. Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 619 (1984).

CONCLUSION

Contrary to Respondent's denials, this court has jurisdiction over the questions presented. The questions were raised and argued in the state court,and in The Petition for Writ of Certiorari to the State Supreme Court, which was denied.(These rights were asserted in at least sixteen different instances). These questions present a colorable claim. **Title 28 USC 3.2 Under 1257 (3) Misapplication of the Rules of Civil Procedure "under color of State law, custom, and usage"** depriving Petitioner, a *Pro se* litigant, of her constitutional right to, due process, equal protection, and application of the laws.

This case involves questions which impact the entire Nation. When a litigant's right to jury selection has been denied, and in subsequent legal malpractice case attorney's directed verdict motions were granted and affirmed by Appellate Court, ignoring attorney's negligence and highly disputed issues of fact, the court has usurped jury functions. The right to trial by jury is **"a basic and fundamental feature of Federal Jurisprudence**." "... in order for a directed verdict to be proper, it not only must be clear that no issue of fact is involved, but the conclusions and inferences to be drawn from the fact must be undisputed as well." (Petition at 14-21)

This case especially deserves this courts'intervention because the **rules** and **the law** has been misapprehended and **grossly** misapplied; behavior which is frequently taking place in court-rooms in South Carolina and across the nation providing virtually absolute immunity for attorneys. For all the above reasons, this Court should grant The Petition for Writ of Certiorari.

Respectfully submitted,

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